SUPREME COURT, U. S.

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No. 866

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

E. W. BUSCHMAN CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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E. W. Buschman Co., Petitioner, prays that this court grant a rehearing of its order of January 15, 1968 denying the petition for a writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in the above entitled case as prayed for in the petition filed November 30, 1967 herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Petitioner alleged in its petition that certiorari should be granted for the writ on several grounds. Upon further consideration and research petitioner has additional substantial grounds, which were not previously presented, for the issuance of the writ of certiorari. One additional

ground is that the Sixth Circuit has rendered in this case a decision in conflict with the decision of two other courts of appeal on the same matter. Two courts of appeal have held that a broad rule prohibiting solicitation on company premises during non-working time and in non-working areas is valid if approved in a collective bargaining agreement with a union.[1] Admittedly the Sixth Circuit in the present case said that such a rule approved by the union was valid, but it refused to grant any efficacy to that rule. This arises from the fact that the rule expressly provided that a violation thereof was grounds for discharge. The court concluded that the three employees were discharged for violating the shop rule, *inter alia*, but still ordered reinstatement. As a result, *the effect* of the Sixth Circuit decision is that such a no-solicitation rule is invalid because it is unenforceable. This conflicts with *the effect* of the Seventh Circuit and the Ninth circuit decisions which have held that such a rule is enforceable in the cases cited in footnote 1. Thus, although on the surface there is no conflict between the Sixth Circuit on the one hand, and the Seventh and Ninth on the other, *the effect* of the Sixth Circuit's decision in our case is to put it "in conflict with the decision of another court of appeals on the same matter . . ." (Rule 19 (1) (b) of the Rules of this Court.)

2. In addition to the above conflict *in effect* between the courts of appeal, the other substantial ground not previously presented is that there is a potentiality of a directly conflicting ruling coming from another court of appeals. In *Mid-States Metal Products, Inc., et al.*, 156

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[1] *NLRB* v. *Gale Products*, 337 F.2d 390 (CA 7, 1964); *NLRB* v. *General Motors*, (CA 9) No. 21,031, an unreported per curiam order of January 12, 1967 denying enforcement of the Board's order in *General Motors Co.*, 158 NLRB 1723. Note this Ninth Circuit disposition was not discovered by petitioner when the prior petition and reply brief were submitted by petitioner.

NLRB, No. 90 (January 17, 1966), among other issues, there was involved a broad no-solicitation rule incorporated into a collective bargaining agreement. This rule was invoked by the company to discharge an employee who was circulating an anti-union petition. The Board held that the rule could not be invoked to discharge an employee under such circumstances and required reinstatement. The Board sought enforcement of its decision and order in the Fifth Circuit in the case of *NLRB* v. *Mid-States Metal Products, Inc.*, No. 23352. That case was argued on April 12, 1967 and no decision has been issued yet.[2] If the Fifth Circuit reverses the Board (in conformance with the Seventh and Ninth Circuit positions) and holds that such a rule can be the basis for the discharge of an employee, it would be in conflict with the Sixth Circuit ruling in this case. This Court has in the past taken in cases on writs of certiorari where there is the potentiality of conflict between the courts of appeals.[3] At the least, this Court should delay acting on this petition for a rehearing until the Fifth Circuit issues a decision in *Mid-States Metal Products, supra.*

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[2] The posture of this case before the Fifth Circuit was unknown to petitioner when the petition for a writ of certiorari and reply brief were filed.

[3] See Stern & Gressman, *Supreme Court Practice*, 3rd Edition, Pages 131-2:

> "Where the district court decision is pending on appeal to another court of appeals, and the petitioner seeking review of the court of appeals decision cannot delay his petition for certiorari until the other appeal has been decided, the Supreme Court has occasionally granted the Petition. See *Gulf States Steel Co.* v. *United States*, 287 U.S. 32. In that circumstance, the Court may consider that the possibility of the other appeal resulting in an affirmance and therefore in conflict between the courts of appeals is enough to warrant review. Otherwise the petitioner would be unable to secure review, because of the time element, should the other appeal result in a direct conflict on the appellate level."

In view of the importance of the no-solicitation rule, it is respectfully submitted that the validity and effect of such a rule, when approved by the union, should be determined by this Court and the conflicts resolved thereby.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari and the reply brief of petitioner, it is respectfully urged that (1) a rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Sixth Circuit or (2) in the alternative, this Court await the Fifth Circuit's decision in *Mid-States Metal Products* because of the potentiality of a conflict among the circuits.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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Attorney for Petitioner